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NTSB Order No. EA-3490

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 29th day of January, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

ROBERT ALBERT TUR,

Respondent.

Docket: SE-8371

OPINION AND ORDER

Both respondent and the Administrator have appealed from an initial decision issued orally by Administrative Law Judge Jerrell R. Davis at the conclusion of an evidentiary hearing held on September 21, 22 and 23, 1988.¹

This proceeding stems from a helicopter flight conducted by respondent in the vicinity of Banning Pass, near San Geronio Mountain, California, on March 25, 1987. The purpose of that flight was to obtain a video depiction, for broadcast usage, of the site of a crash involving

¹An excerpt from the transcript containing the initial decision is attached.

an F-4 military jet.²

On June 8, 1987, the Administrator ordered that respondent's private pilot certificate be suspended for 180 days.³ In his order of suspension (which served as the complaint), the Administrator alleged the following:

- "1. You are now, and at all times mentioned herein were, the holder of Private Pilot Certificate No. 567494464.
2. On or about March 25, 1987, you were the pilot-in-command of a Bell 206B helicopter, Registration No. N2068B, and you operated on a Visual Flight Rules flight at and in the vicinity of Mount San Geronio, about 7 miles north of Banning, California.
3. Your operation of the helicopter as described above, took place at about 5:00 p.m. PST, during the hours of daylight.
4. At the time of your operation of the helicopter, as described above, a NOTAM [Notice to Airmen] was in effect prohibiting operations '6 nautical miles radius of the Palm Springs, California VORTAC 290 degrees radial at 25 nautical miles at and below 5,000 feet AGL to provide a safe environment for helicopter search operations.'
5. The NOTAM was issued to facilitate search and rescue operations involving a missing military jet fighter aircraft.
6. You operated the helicopter, within the area prohibited by the NOTAM, over the site of the found and crashed fighter aircraft at altitudes of about 150-200 feet AGL.

²The crash was especially newsworthy in that it involved Dean Paul Martin, son of entertainer Dean Martin.

³The Administrator subsequently revoked respondent's airman certificate on an emergency basis on September 27, 1991, for various FAR violations alleged to have occurred after those at issue here. That revocation was upheld in Board Order EA-3458.

7. Your operation over the crash site was at very slow speeds, and at times in a hover attitude.
8. At the time of your operation of the helicopter over the crash site, there were search and rescue helicopters flying over the crash site, and there were search and rescue personnel on the ground at and near the crash site.
9. Your operation of the helicopter, as described above,
 - a. created a hazard to people and property on the surface; and
 - b. constituted a careless operation so as to endanger the life and property of another.

By reason of the foregoing circumstances, you violated the following Federal Aviation Regulations ["FAR," 14 C.F.R. Part 91]:

- a. Section 91.79(d), in that you operated a helicopter at an altitude which created hazard to persons or property on the surface.
- b. Section 91.91(b) and (c), in that you operated an aircraft contrary to the temporary flight restrictions established in a NOTAM, and without complying with the required conditions.
- c. Section 91.9, in that you operated an aircraft in a careless manner so as to endanger the life or property of another."

The allegation of an FAR section 91.91(b) violation was subsequently dropped by the Administrator.⁴

⁴See Tr. 905-06. The FAR provisions that remain pertinent to this case read as follows:

"§91.79 Minimum safe altitudes; general.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

* * * *

(Footnote 4 continued on next page.)

In his initial decision, the law judge determined that a violation of FAR section 91.79(d) had not been shown. However, he found that respondent had violated FAR sections 91.91(c)(5) and 91.9, and upheld the

(Footnote 4 continued)

(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section [1,000 feet in congested areas; 500 feet in other than congested areas over the highest obstacle or over any person, vessel, vehicle or structure] if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the Administrator.

§91.91 Temporary flight restrictions.

(a) The Administrator will issue a Notice to Airmen (NOTAM) designating an area within which temporary flight restrictions apply and specifying the hazard or condition requiring their imposition, whenever he determines it necessary in order to--

* * * * *

(2) provide a safe environment for the operation of disaster relief aircraft;

* * * * *

(c) When a NOTAM has been issued under paragraph (a)(2) of this section, no person may operate an aircraft within the designated area unless at least one of the following conditions are met:

* * * * *

(5) The aircraft is carrying properly accredited news representatives, and, prior to entering the area, a flight plan is filed with the appropriate FAA or ATC facility specified in the Notice to Airmen and the operation is conducted above the altitude used by the disaster relief aircraft, unless otherwise authorized by the official in charge of on scene emergency response activities.

§91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

180-day suspension of respondent's private pilot certificate ordered by the Administrator.⁵

Respondent has, in his appeal brief, contended that there was inadequate evidentiary support for the law judge's findings of FAR section 91.91(c)(5) and 91.9 violations, and that, in determining such violations occurred, the law judge improperly discounted evidence which he presented at the hearing. He has also asserted that, insofar as FAR section 91.91(c)(5) restricts representatives of the media from covering newsworthy events, it is violative of his First Amendment rights. In addition, respondent maintains that FAR section 91.91(c)(5) is unconstitutionally vague, and that the law judge misinterpreted that regulation in evaluating its applicability to the flight in question. Respondent has further contended that, during the course of the hearing, the law judge made various remarks which demonstrated bias against him, both personally and as a member of the media. The Administrator has submitted a reply brief in which he urges that the violations found by the law judge be affirmed and the 180-day suspension of respondent's private pilot certificate be sustained.

In his appeal brief, the Administrator contends that the law judge erred in failing to find a violation of FAR section 91.79(d). In this regard, he has asserted that the law judge misconstrued the case law concerning the existence of a hazard to persons or property on the

⁵The law judge also determined that respondent was not entitled to a waiver of sanction under the Aviation Safety Reporting Program. Respondent did not contest that finding in connection with his appeal, and that matter will not be considered by the Board herein.

surface as requiring a showing of actual injury or damage to such persons or property. In addition, the Administrator maintains that the evidence in this case demonstrates that respondent's flight presented an "actual hazard" to persons or property on the ground. Respondent did not file a brief in reply.

Upon consideration of the briefs and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the law judge's initial decision, except to the extent that a violation of FAR section 91.79(d) was not found. We believe that such a violation occurred, and will, therefore, grant the Administrator's appeal.

In considering respondent's appeal, we have observed that he disputes the law judge's finding that he violated FAR section 91.91(c)(5) on various legal and factual bases. Turning first to the legal questions raised by respondent, we note that he has challenged the constitutionality of FAR section 91.91(c)(5) on the grounds that it violates the First Amendment and is impermissibly vague. However, "the Board lacks the authority to rule on the constitutional validity of regulations promulgated by the Administrator. Rather, the Board's authority to review regulatory violations alleged by the Administrator extends solely to the question of whether the cited regulations have in fact been violated."⁶ Respondent further maintains that the law judge

⁶Administrator v. Lloyd, 1 NTSB 1826, 1828 (1972). See also Administrator v. Weiser, 2 NTSB 2335, 2337 (1976). Moreover, federal appeals courts have held that an airman "clearly cannot exempt himself from FAA safety regulations by virtue of the fact that he may have been en route to or engaging in news-gathering activities," Hill v. NTSB,
(Footnote 6 continued on next page.)

erroneously interpreted FAR section 91.91(c)(5) as requiring that media pilots obtain permission to enter a NOTAM area at any altitude, while the regulation actually allows entry without authorization above the altitude used by disaster relief aircraft if a flight plan has been filed. We do not, however, discern such a misinterpretation of FAR section 91.91(c)(5) from the record.⁷

It is also contended by respondent that there was insufficient evidentiary support for the law judge's finding that he violated FAR section 91.91(c)(5). In this regard, he asserts that it was not established that he entered the NOTAM area when he overflowed the crash site, and points out that there was testimony that the coordinates he obtained on a subsequent overflight of the site using a LORAN device placed the site outside the boundaries of the NOTAM. However, the on-scene commander of the relief operation testified that the crash site coordinates he obtained with the aid of a large-scale topographical map placed the site within the NOTAM area. Additionally, the testimony of an expert witness presented by the Administrator tended to cast doubt on both the general accuracy of LORAN devices and the validity of the particular method which respondent used to obtain the crash site coordinates. The law judge made a credibility finding that respondent

(Footnote 6 continued)

886 F.2d 1275, 1282 (10th Cir. 1989), and that FAR provisions are not unconstitutionally vague if they provide "fair warning of the proscribed conduct," Daily v. Bond, 623 F.2d 624, 626 (9th Cir. 1980). We believe that FAR §91.91(c)(5) complies with the due process standard set forth in Daily.

⁷Moreover, even if respondent were correct in his assertion, a violation of FAR §91.91(c)(5) is apparent under the facts found by the law judge. (See discussion, infra.) Any such error would, therefore, have been harmless.

entered the NOTAM area, and there was ample evidence to support it. We, therefore, have no reason to overturn that determination.

In a similar vein, respondent attacks the law judge's finding that he did not file a flight plan prior to entering the NOTAM area. In this regard, he asserts that the sole evidence offered by the Administrator to show that no flight plan had been filed was a statement from the office manager of the Riverside Flight Service Station,⁸ which, he claims, was inadmissible hearsay. Additionally, respondent maintains that that statement was rebutted by testimony offered by himself, the photographer who accompanied him on the flight, and his wife, who was working at the assignment desk of his news service on the day in question.⁹ As this is an administrative proceeding, hearsay evidence is admissible.¹⁰ Here, the law judge believed the statement of the flight service station's office manager to be probative and persuasive, and, taking into account the contrary testimony presented at the hearing, made a credibility determination that a flight plan had not been filed. The Board will not

⁸Ex. C-11. The Riverside Flight Service Station was the FAA coordination facility named in the NOTAM.

⁹At the hearing, all three indicated that a flight plan had been filed with the Los Angeles/Hawthorne Flight Service Station.

¹⁰See 5 U.S.C. §556(d); Administrator v. Sacks, 1 NTSB 1894, 1894 (1972); Administrator v. Trier, 2 NTSB 379, 380 (1973). The Board also notes in passing that, as the challenged statement contained an admission against interest attributed to respondent, it would likely have been deemed admissible in a civil proceeding as well. It is more probable that the testimony of respondent's wife, reflecting only what he told her regarding the filing of a flight plan, would be subject to attack on hearsay grounds in a civil forum.

disturb such a finding.¹¹

Respondent has also challenged the law judge's determination that he exercised deficient judgement in the operation of his helicopter and, thus, violated FAR section 91.9.¹² In so doing, he attacks the law judge's factual determinations that he operated the helicopter as low as 250 feet above ground level and at a speed not exceeding 30 knots, placing him within the hazardous region of the aircraft's height/velocity curve.¹³

Respondent has asserted that the law judge's finding with respect to altitude was unwarranted, and resulted from a speculative effort to reconcile the testimony of various witnesses, none of whom set the altitude of the helicopter at 250 feet. At the hearing, the

¹¹Even if respondent had satisfied the law judge that a flight plan was filed, it is uncertain as to whether the filing of a flight plan with the Los Angeles/Hawthorne Flight Service Station would be deemed a filing with the "appropriate" FAA facility under FAR §91.91(c)(5). In view of the law judge's finding, however, we need not address that question herein. The law judge's finding also renders moot respondent's argument that there was no §91.91(c)(5) violation because he conducted his flight at an altitude above that used by relief aircraft, as the filing of a flight plan is a prerequisite to such a defense.

¹²The law judge applied the standard set forth in Administrator v. Reynolds, 4 NTSB 240, 242 (1982), in which the Board stated that an FAR §91.9 violation based on a showing of potential endangerment to persons or property as a result of the operation of a helicopter requires a determination that the likelihood of potential harm was unacceptably high or the pilot's exercise of judgement in operating the aircraft was clearly deficient. It is significant that, in Reynolds, no other FAR violation was established. In cases such as the present one, where a violation of an operational FAR provision is deemed to have occurred, a "residual" §91.9 violation may be found. See, e.g., Administrator v. Cory, NTSB Order EA-2767 at 6 (1988); Administrator v. Dutton, NTSB Order EA-3204 at 6-7 (1990); Administrator v. Thompson, NTSB Order EA-3247 at 5 n.7 (1991).

¹³A curve appearing in the aircraft's flight manual, depicting combinations of altitude and airspeed from which a safe autorotational landing may not be possible in the event of an engine power loss.

Administrator presented several eyewitnesses who offered altitude estimates ranging from 100 to 150 feet. Respondent testified that he flew the helicopter no less than 1,200 feet above the ground, and his cameraman estimated that the altitude of the aircraft was between 1,200 and 1,500 feet when it passed over the crash site. Additionally, one of respondent's witnesses estimated, on the basis of viewing the videotape shot from respondent's helicopter,¹⁴ that its altitude was 800 to 1,500 feet above ground level. In cases such as this, it is permissible for a law judge to reconcile the varying approximations made by a number of witnesses "in order to arrive at the most reasonable factual conclusion to be drawn from all of the available evidence."¹⁵ The fact that the altitude arrived at fails to coincide with that estimated by any of the witnesses does not render such a finding invalid,¹⁶ and does not establish that the law judge engaged in improper speculation in this case.

With respect to the factual determination made as to velocity, respondent claims that the law judge improperly rejected the airspeed estimate offered by one of his expert witnesses (40 knots), while accepting that witness' testimony that vibration would be visible on a

¹⁴Ex. R-4. The videotape was shot using a zoom lens having a focal length ratio of 14 to 1 (Tr. 545).

¹⁵Administrator v. Booher, 3 NTSB 3434, 3436 (1981), affirmed sub nom. Booher v. NTSB, 673 F.2d 1306 (4th Cir. 1982).

¹⁶See Administrator v. Robinson, 2 NTSB 1051, 1052 (1974) (testimony of respondent that he flew his aircraft at an altitude of 700 feet and testimony of two eyewitnesses that the aircraft was flown at an altitude of approximately 460 feet reconciled by law judge in finding that respondent's altitude was 550 feet; law judge's finding accepted by Board).

videotape shot from his helicopter if it were traveling at airspeeds of 30 knots or less. Clearly, a law judge is not required to accept or reject the testimony of a witness in its entirety.¹⁷ Here, the law judge accepted the yardstick provided by respondent's expert witness for determining airspeed and, based on his own analysis of the videotape, determined that he saw sufficient evidence of vibration to warrant a finding that the helicopter was flown at a speed of no more than 30 knots. The law judge was well within his province as trier of fact to do this, and his determination will not be disturbed by the Board.

We are, therefore, unpersuaded that the law judge erred in finding respondent in violation of FAR sections 91.91(c)(5) and 91.9. In reaching this conclusion, we have noted respondent's contention that the law judge was personally biased against him. Specifically, respondent, who is Jewish, has asserted that the law judge made a remark of an anti-Semitic nature at the hearing. A review of the transcript reveals that, during the course of a discussion between the law judge and respondent's counsel relating to the commission of FAR violations by airmen with long-standing violation free records (of which respondent was then one), the following exchange took place:

"[Law Judge:] So, I'm sure from observing [respondent] here for two days, I'm sure he's a sharp fellow. But, a sharp fellow makes mistakes from time to time. The fact that he's very prolific, I mean very proficient, doesn't mean a halo stays over him all the time.

¹⁷Administrator v. Booher, supra, 3 NTSB at 3436.

I know its way, way before your time when you grew up but you heard of the Leopold case in Chicago that --

[Counsel]: Sure I have, Your Honor.

[Law Judge]: These two rich Jews there, for lack of anything else, they're highly intelligent, they go out and murder a kid, you know. No reason at all to do it but these things happen. Human nature is a funny quirk at times.

So I don't really need -- I'm sure he's got all kind of recommendations and got an outstanding record." (Tr. 837.)

The ethnic reference made by the law judge was both unfortunate and unnecessary. However, we are unconvinced that the law judge's remark, taken in context, demonstrates prejudicial error.¹⁸ While respondent has also claimed that the law judge made statements indicative of a bias against the media at the hearing, the Board does not, upon carefully reviewing the transcript, discern such a bias. In short, we do not sense from the record that the law judge exhibited a lack of partiality in finding that respondent had violated FAR sections 91.91(c)(5) and 91.9.

Turning to the Administrator's appeal, we note that he has disputed the legal basis for the law judge's finding that respondent did not violate FAR section 91.79(d). In particular, the Administrator maintains that the law judge erroneously interpreted pertinent case law as requiring a showing of actual injury to persons or property on the

¹⁸Indeed, respondent's counsel voiced no objection to the law judge's remark at the hearing. While respondent has also alleged that an ethnic slur was made by the law judge toward another witness, we note that the witness in question testified on behalf of the Administrator, and fail to see how this would prejudice respondent's case.

surface in order to establish that a hazard to such persons or property was created. A review of the record confirms that the law judge was of such a view.¹⁹ The Board has not, however, interpreted FAR section 91.79(d) in that way. Indeed, there have been a number of cases that have come before the Board in which neither persons nor property were harmed but a violation of FAR section 91.79(d) was deemed to have been established.²⁰

In cases involving FAR section 91.79(d), the proper point of inquiry is whether the operation of a helicopter presented an "actual hazard" to persons or property on the surface.²¹ A review of the record in this case discloses that the crash site overflown by respondent was located in mountainous, uneven and rocky terrain, and that there were disaster relief aircraft and personnel on the ground in the vicinity of respondent's flight path. At the time of the overflight, a group of rescue workers in the area was attempting to climb up a steep slope. Eyewitnesses reported that there was a right quartering tailwind relative to the path of respondent's flight. Considering these factors in light of the law judge's findings as to respondent's altitude and airspeed (which, as noted above, placed his operation of the helicopter within the hazardous region of the height/velocity curve), we believe that a safe

¹⁹Tr. 950-51.

²⁰See, e.g., Administrator v. Colvig, 4 NTSB 202 (1982); Administrator v. Essery, NTSB Order EA-2221 (1985), affirmed as to establishment of an FAR §91.79(d) violation but reversed as to sanction sub nom. Essery v. Department of Transportation, 857 F.2d 1286 (9th Cir. 1988); Administrator v. Lewis, NTSB Order EA-2266 (1986); Administrator v. Peelgrane, NTSB Order EA-2602 (1987); Administrator v. Young, NTSB Order EA-2750 (1988).

²¹See Administrator v. Reynolds, *supra*, 4 NTSB at 241.

autorotational landing would have been unlikely in the event of failure of the engine, and that persons or property on the surface were imperiled as a result. Additionally, disaster relief workers who were on the ground at the time of the overflight testified that noise generated by respondent's helicopter startled ground personnel, caused some workers to lose their footing, and created communication problems. We think that this further demonstrates endangerment to individuals on the surface. This being the case, we conclude that a violation of FAR section 91.79(d) has been shown.

Regarding the matter of sanction, the Board has noted that, in sustaining the 180-day suspension of respondent's private pilot certificate, the law judge emphasized that he found respondent's attitude to be non-compliant and determined that the FAR section 91.91(c)(5) violation was deliberate. In view of these factors and the nature of the violations established, we believe that a 180-day suspension is wholly appropriate.²² Thus, we affirm that suspension.

²²Additionally, as the Board has determined that all of the FAR violations alleged by the Administrator were established, we note that our long-standing policy in such cases has been to uphold the sanction ordered by the Administrator, in the absence of clear and compelling reasons supporting a reduction in sanction. See Administrator v. Muzquiz, 2 NTSB 1474, 1477 (1975). No such factors have been shown to exist here.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's appeal is granted;
3. The initial decision is affirmed to the extent that it affirms the Administrator's findings of violations of FAR sections 91.91(c)(5) and 91.9;
4. The initial decision is reversed to the extent that it reverses the Administrator's finding of a violation of FAR section 91.79(d), and the Administrator's finding of that violation is affirmed; and
5. The 180-day suspension of respondent's airman certificate is sustained.

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.